Supreme Court, U.S.
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No. 04-506

In The

Supreme Court of the United States

DAVID L. CLEVINGER, JR. and JEROLD J. HAWKINS,

Petitioners,

v.

DIVERSIFIED TELECOM SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it is a violation of the Fourteenth Amendment's Due Process Clause for a state court to exercise long-arm jurisdiction over a nonresident defendant that has no minimum contacts with the forum State.

2. Whether *International Shoe's* minimum contacts analysis still requires that a nonresident defendant must purposefully avail itself of the privilege of conducting activities within the forum State in order for personal jurisdiction to exist.

3. Whether tort-based claims should be analyzed differently than contact-based claims for purposes of determining whether personal jurisdiction exists.

4. Whether *Calder v. Jones* requires a nonresident defendant to expressly aim its tortious conduct at the forum State, as opposed to the plaintiff merely suffering some injury in the forum state, in order for personal jurisdiction to exist.

5. Whether a state court must utilize the general/specific jurisdiction dichotomy when analyzing issues of personal jurisdiction.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In addition to the parties listed in the caption, Skyline Services, LLC (Skyline), a Michigan limited liability company, was a party to the proceedings below. However, Respondent's counsel conceded at oral argument before the Nebraska Supreme Court that the courts of Nebraska did not have personal jurisdiction over Skyline, and the special appearance with respect to Skyline was sustained. App. A, 6-7. Petitioners David L. Clevinger, Jr. (Clevinger) and Jerold J. Hawkins (Hawkins) (Clevinger and Hawkins are collectively referred to as Petitioners) are individuals, and Skyline does not have a parent or publicly-held company that owns more than ten percent of the Skyline's stock or units. Petitioners are without sufficient knowledge to know whether Respondent has a parent or publicly-held company that owns more than ten percent of Respondent's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the decision of the Nebraska Supreme Court.

OPINIONS BELOW

The July 16, 2004, opinion of the Nebraska Supreme Court is reported at 683 N.W.2d 338 (Neb. 2004), and is reprinted as App. A. The May 14, 2003, order and opinion of the District Court of Lancaster County, Nebraska is an unpublished opinion and is reprinted as App. B.

STATEMENT OF JURISDICTION

The judgment of the Nebraska Supreme Court was entered on July 16, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

The Nebraska long-arm statute, NEB. REV. STAT. § 25-536, provides that the courts of Nebraska may exercise personal jurisdiction over a person:

(1) Who acts directly or by an agent, as to a cause of action arising from the person:

(a) Transacting any business in this state;

(b) Contracting to supply services or things in this state;

(c) Causing tortious injury by an act or omission in this state;

(d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

(e) Having an interest in, using, or possessing real property in this state; or

(f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or

(2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

STATEMENT OF THE CASE

The narrow facts of this case present the ideal vehicle for the Court to clarify whether any due process restrictions remain on the power of a State, through its long-arm statute,

to exercise personal jurisdiction over a nonresident defendant. Because the Nebraska Supreme Court's decision in this case heralds the demise of any constitutional restrictions on the personal jurisdiction of State courts, the decision warrants review and reversal.

A. Factual Background

This case arises out of Petitioners' employment with Respondent in the State of Michigan, and Petitioners' decision to form Skyline, a Michigan limited liability company.

Petitioners are Michigan residents who have never resided in Nebraska. Respondent is a Nebraska corporation with its principal place of business in Nebraska, with operations throughout the United States. On or about October 31 and November 10, 2001, Petitioner Clevinger met with Respondent's representatives in Las Vegas, Nevada to discuss possible employment with Respondent. On or about November 25, 2001, Clevinger accepted Respondent's offer of employment by telephoning Respondent's representative from Clevinger's residence in Michigan. Clevinger began working for Respondent on December 3, 2001, as the regional manager for Respondent's job sites in the states of Michigan, Indiana, Ohio, and parts of the east coast. At no time did Clevinger's duties involve working in Nebraska. Clevinger's employment was terminated by Respondent on October 3, 2002, when Respondent sent a representative to Michigan to inform Clevinger of his termination.

Likewise, Petitioner Hawkins' employment with Respondent had no connection whatsoever to the State of Nebraska. On or about November 10, 2001, Hawkins spoke

with Respondent's representatives over the telephone from Hawkins' Michigan residence regarding potential employment with Respondent in Michigan. On or about November 14, 2001, Hawkins accepted employment with Respondent, once again over the telephone while Hawkins was physically present at his Michigan residence. Hawkins began working for Respondent on November 19, 2001, as a project manager managing Respondent's telecommunications job sites in Michigan only. Hawkins never performed any work in Nebraska. Hawkins' employment was terminated by Respondent on June 24, 2002, over the telephone while Hawkins was physically present in Michigan.

At no time has either Petitioner personally, or through an agent, solicited or transacted any business in Nebraska, nor entered into any contracts to supply or purchase services or things in Nebraska. Moreover, neither Petitioner derived any revenue from goods used or consumed or services rendered in Nebraska, nor did either of them pay or become obligated to pay any taxes to the State of Nebraska or any Nebraska political subdivision. Finally, neither Petitioner personally maintained any kind of business, inventory or bank account in Nebraska, nor did either Petitioner own or rent any real or personal property in Nebraska. The only time Petitioners were physically present in Nebraska was December 3-4, 2001, when they traveled to Nebraska at the demand and expense of Respondent, their employer, for the purpose of meeting Respondent's staff.

Petitioners organized Skyline on February 6, 2002, with its principal place of business in Howell, Michigan. Skyline is a construction-related service business, whose sole owners, members, officers, directors, and stockholders are Petitioners. On November 1, 2002, Respondent filed a

petition in the District Court of Lancaster County, Nebraska, alleging that Petitioners formed Skyline to compete with Respondent and, by doing so, breached the common law duty of loyalty, tortiously interfered with Respondent's business relations, committed fraud, and converted Respondent's property to Petitioners' own use–the operative acts for which necessarily would have occurred outside of Nebraska. After being served with the petition in Michigan, Petitioners and Skyline filed a special appearance pursuant to NEB. REV. STAT. § 25-516.01(2) for the reason that Petitioners did not have the minimum contacts with Nebraska that would permit Nebraska courts to exercise personal jurisdiction over Petitioners.

B. Trial Court Decision

In an order dated May 14, 2003, the Nebraska district court sustained Petitioners' special appearance. In applying the general/specific jurisdictional dichotomy employed by this Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984), the district court concluded that "there is insufficient evidence showing that the [Petitioners and Skyline] had continuous and systematic business contact with Nebraska sufficient to warrant general jurisdiction over their actions in this matter." App. B, 19. In analyzing whether specific jurisdiction existed, the district court applied the tripartite analysis advocated by the U.S. Court of Appeals for the Ninth Circuit in *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987):

> (1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof;

> or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable.

Id. at 1421. The district court's specific jurisdiction analysis focused on Respondent's claim that jurisdiction was established by Petitioners' single visit to Nebraska and telephone calls made by Petitioners to Respondent's Nebraska office. App. B, 20-22. Because the record established that Petitioners were "required to . . . communicate with the [Respondent's Nebraska] office," the district court concluded that Petitioners did not purposefully direct their activities at Nebraska residents, that the claims did not arise out of Petitioners' forum-related activities, and "that defending this action in Nebraska would place an unreasonable burden on the [Petitioners]." App. B, 22-23. Consequently, personal jurisdiction did not exist, and Petitioners' special appearance was sustained.

C. Nebraska Supreme Court Decision

Respondent appealed the district court's decision to the Nebraska Court of Appeals, and the Nebraska Supreme Court removed the case to its docket. The Nebraska Supreme Court rejected the three-prong test employed by the Ninth Circuit in *Lake v. Lake*. It held that personal jurisdiction over Petitioners was appropriate, and found minimum contacts in "[Petitioners'] purposeful availment of the benefits and protections of the law of the forum

state." App. A, 10. In essence the Nebraska Supreme Court applied a two-step process: (1) whether the nonresident defendant purposefully availed itself of the benefits and protections of Nebraska law, thereby establishing minimum contacts with Nebraska; and (2) if such purposeful availment has been established, the "contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." App. A, 11. The Nebraska Supreme Court did not specifically find that it was exercising specific, as opposed to general, personal jurisdiction.

In applying the first-prong of its test, the Nebraska Supreme Court concluded that sufficient minimum contacts existed because Petitioners were employed by and provided services to Respondent, for which they were paid. "More importantly, Clevinger and Hawkins came to Nebraska on December 3 and 4, 2001, to meet [Respondent's] staff and also made hundreds of calls to Nebraska from November 2001 to July 2002." App. A, 10. To overcome the district court's conclusion that the visit and telephone calls were mandated by Respondent, the Nebraska Supreme Court concluded that "the employment relationship between [Respondent] and Clevinger and Hawkins by definition includes various *mutual*, rather than unilateral, promises and obligations." App. A, 10 (emphasis in original). Thus, minimum contacts were purportedly established by: (1) Petitioners' employment outside of Nebraska by a corporation domiciled in Nebraska; (2) a single brief visit to Nebraska at the demand and expense of Respondent; and (3) telephone calls to Respondent's Nebraska office, which Respondent also mandated as a condition of Petitioners' employment.

With respect to the second-prong of the aforementioned test, the Nebraska Supreme Court held that "Nebraska's exercise of jurisdiction over Clevinger and Hawkins would not offend notions of fair play and substantial justice" because "[w]ith the ease of modern transportation and communications, it is difficult to see the burden on Clevinger and Hawkins of defending this action in a state where they have had contacts and whose laws they have availed themselves of." App. A, 12.

The Nebraska Supreme Court failed to determine whether Respondent's claim was "one which arises out of or relates to the defendant's forum-related activities." Moreover, the Nebraska Supreme Court applied a standard of "purposeful availment," which is a contract-based standard of personal jurisdiction rather than the "purposeful direction" analysis used by some lower courts in tort-based actions.

REASONS FOR GRANTING THE PETITION

In finding that the courts of Nebraska have personal jurisdiction over Petitioners, the Nebraska Supreme Court created conflicts between itself and other lower courts that need to be resolved. Specifically, the Nebraska Supreme Court dispensed with the general/specific jurisdiction dichotomy previously adopted by this Court. Moreover, the Nebraska Supreme Court rejected the three-part analysis in *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987) adopted by the Ninth Circuit and other lower courts. In addition, the Nebraska Supreme Court incorrectly applied a "purposeful

availment" standard to Respondent's tort-based claims rather than the "purposeful direction" standard used by lower courts such as the Ninth Circuit. The Nebraska Supreme Court also exacerbated the lower court conflict by not applying this Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984). Finally, and perhaps most importantly, this Court has not addressed the intricacies of personal jurisdiction for a number of years. It has been seventeen years since this Court addressed *International Shoe*'s minimum contacts requirement in *Asahi Metal Indus., Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987), and fourteen years since the issue was raised in *Burnham v. Superior Court*, 495 U.S. 604 (1990). Those deeply divided decisions provided little guidance to lower courts struggling with the issues involved in the case at bar. The result has been "[t]he sprouting like weeds of multi-pronged tests . . . in both specific and general jurisdiction cases [which] has left this legal garden in disarray." *Metropolitan Life Ins. Co. v. Robinson-Ceco Corp.*, 84 F.3d 560, 577 (2d Cir. 1996) (Walker, J., dissenting), *cert. denied*, 519 U.S. 1006 (1996). The time has come for these conflicts to be resolved by the Court.

I. In Exercising Personal Jurisdiction Over Petitioners, The Nebraska Supreme Court Improperly Applied A "Purposeful Availment" Standard To Respondent's Tort-Based Claims Rather Than The "Purposeful Direction" Standard.

This Court should resolve the conflict created by the Nebraska Supreme Court, specifically, whether tort-based claims should be treated differently than contact-based

claims for purposes of determining whether personal jurisdiction exists.

In 1945, this Court held that the Due Process Clause of the Fourteenth Amendment precludes a State from exercising in personam jurisdiction over a nonresident defendant unless that defendant has "minimum contacts" with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Thirteen years later in *Hanson v. Denckla*, 357 U.S. 235 (1958), the Court expounded upon what it meant by "minimum contacts":

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Id. at 253. The "purposeful" requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations omitted); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). "The concept of [purposefully established] minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burden of litigating in a distant or inconvenient forum. And it acts to

ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292. Based upon this Court's holdings to date, "[t]he constitutional touchstone remains whether the defendant *purposefully established* 'minimum contacts' in the forum State." *Burger King*, 471 U.S. at 474 (quoting *International Shoe Co.*, 326 U.S. at 316) (emphasis added). In the case at bar, the Court should decide whether different standards of "purposeful" are required for different types of claims.

The Nebraska Supreme Court created a conflict among the lower courts by applying a "purposeful availment" standard to all actions, regardless of whether they were based in tort or contact. It found that "it is essential in each case that there be some act by which the defendant purposely avails himself of the privilege of conducting activities within the forum." App. B, 9. However, the Nebraska Supreme Court's decision directly conflicts with other lower courts. For example, the Ninth Circuit has distinguished between "purposeful availment" and "purposeful direction":

> [A]vailment and direction are, in fact, two distinct concepts. A purposeful availment analysis is most often used in suits surrounding in contract. A purposeful direction analysis, on the other hand, is most often used in suits surrounding in tort.
>
> A showing that a defendant purposefully availed himself of the privilege of doing business in a forum state typically consists of evidence of the defendant's actions in the forum, such as executing or performing a contract there. . . .

> A showing that a defendant purposefully directed his conduct toward a forum state, by contrast, usually consists of evidence of the defendant's actions outside the forum state that are directed at the forum, such as the distribution in the forum state of goods originating elsewhere.

Schwarzenegger v. Fred Martin Co., 374 F.3d 797, 802-03 (9th Cir. 2004) (citations omitted). Respondent's claims for tortious interference, breach of the duty of loyalty, fraud and conversion all sound in tort and require a "purposeful direction analysis" under the holding in *Schwarzenegger* and other cases. The Nebraska Supreme Court, on the other hand, focused solely on Petitioners' employment with Nebraska-domiciled Respondent and the Petitioners' purposeful availment of the privilege of conducting activities in Nebraska, even though the crux of Respondent's claim is not based on a contractual relationship. Rather, Respondent's claims are based in tort and, by their very definition, arose out of acts allegedly occurring outside of the forum State. This conflict should be resolved.

II. The Nebraska Supreme Court Ignored *Calder v. Jones* And Applied An Overly Broad Definition Of "Purposeful Availment."

By applying a purposeful availment standard, the Nebraska Supreme Court circumvented this Court's "effects" test set forth in *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder*, this Court found that personal jurisdiction in California was properly exercised over employees of the National Enquirer, which published an allegedly defamatory article in Florida. "Jurisdiction . . . is . . . proper in California based on the 'effects' of [Defendants'] Florida conduct in California." *Id.* at 789. "Their intentional, and

allegedly tortious, actions were expressly aimed at California." *Id.*

The present case provides the ideal vehicle for this Court to resolve this conflict regarding the proper application of *Calder*. Specifically, the lower courts are split on whether to apply *Calder* narrowly or broadly. Compare *Imo Indus. v. Kiekert Ag.*, 155 F.3d 254, 261 (3d Cir. 1998) ("The majority of our sister circuits that have considered the application of *Calder* to business torts have adopted a narrow construction."). *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997) (reading *Calder* very broadly to find personal jurisdiction in Illinois where the California defendant induced the Illinois plaintiff's New Jersey client to stop doing business with plaintiff). The Nebraska Supreme Court appears to be following suit with the Seventh Circuit and reading *Calder* very broadly.

The Ninth and Third Circuits have developed workable tests and have construed *Calder* to require more than foreseeability. Both require that the defendant *expressly aim* his conduct into the forum State. The Ninth Circuit's three-part test requires that a defendant have:

> (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.

Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002). Respondent's claims in the case at bar fit under the *Dole Food* tripartite test because Respondent alleged that Petitioners committed an intentional act by tortiously interfering with Respondent's business relationships in Michigan and elsewhere outside of Nebraska.

The Third Circuit has adopted a test similar to the test adopted in *Dole* that requires a plaintiff to show:

> (1) the defendant committed an intentional tort; (2) the plaintiff felt the burden of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort; and (3) the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.

Imo Indus., 155 F.3d at 265-66.

Respondent cannot demonstrate, and the Nebraska Supreme Court failed to address, whether Petitioners *expressly aimed* their alleged acts at the State of Nebraska. The case at bar presents the Court with the opportunity to define both "purposeful direction" and "expressly aimed." This Court found purposeful direction in *Calder* where the Florida-based National Enquirer published an allegedly defamatory article using California sources. In addition, "California was the focal point of both the story and of the harm suffered." *Calder*, 465 U.S. at 789. And, "they knew that the brunt of that injury would be felt by [Jones] in the State where she lives and works and in which the National Enquirer has its largest circulation." *Id.* at 789-90.

The Ninth Circuit rejected a claim of purposeful direction in *Schwarzenegger* and held that California courts could not exercise personal jurisdiction over an Ohio car dealership. In *Schwarzenegger*, the defendant published an advertisement using Arnold Schwarzenegger's image without his permission. The advertisement was only circulated in Ohio and never circulated in California. The

Ninth Circuit held that "[i]t may be true that [defendant's] intentional act eventually caused harm to Schwarzenegger in California and [defendant] may have known that Schwarzenegger lived in California, but this does not confer jurisdiction, for [defendant's] express aim was local." *Schwarzenegger*, 374 F.2d at 807.

Likewise, all of Petitioners alleged actions herein were directed or aimed outside of Nebraska. Respondent has alleged that Petitioners, who worked exclusively outside of the State of Nebraska, improperly formed Skyline, a business that competed with Respondent in the State of Michigan. Implicit in the Nebraska Supreme Court's decision is its conclusion that personal jurisdiction exists over any defendant who commits a tort against any plaintiff residing in the forum State so long as the plaintiff has economic consequences in the forum State. Such an analysis renders *International Shoe* meaningless, and, as a result, this conflict should be resolved.

III. In Exercising Personal Jurisdiction Over Petitioners, The Nebraska Supreme Court Jettisoned The General/Specific Jurisdiction Dichotomy And Failed To Address Whether Respondent's Claims Were Ones "Which Arise Out Of Or Relate To The Defendant's Forum-Related Activities."

Since at least 1984, this Court's due process jurisprudence as it relates to jurisdiction has distinguished between "general" and "specific" jurisdiction. A court exercises specific jurisdiction "when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum."

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. at 414, n. 8 (citations omitted). However, "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." *Id.* n. 9 (citations omitted). Based upon this Court's precedent, a court may only exercise general jurisdiction over a nonresident defendant if the nonresident defendant has engaged in "continuous and systematic general business contacts" with the forum State. *Id.* at 416. Stated another way, the "defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297.

In analyzing whether jurisdiction existed, the district court applied the tripartite analysis advocated by the U.S. Court of Appeals for the Ninth Circuit in *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987):

> (1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable.

Id. at 1421.

The Nebraska Supreme Court's decision in the case at bar is fatally flawed and raises novel issues of constitutional law that demand clarification. First, the Nebraska Supreme Court dispensed with the general/specific jurisdiction dichotomy previously adopted by this Court, choosing instead to analyze the facts under a modified two-part test: (1) whether the nonresident defendant has the necessary minimum contacts with the forum State; and (2) "if such minimum contacts have been established, the contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." App. A, 9. Such legal legerdemain was necessary for the Nebraska Supreme Court to reach its holding for the allegations at issue in this case do not give rise to questions of *specific* jurisdiction but, rather, *general* jurisdiction. Under the general jurisdiction standards previously announced by this Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, there was simply no way that Petitioners' mandatory lone visit and telephone calls conducted at the insistence of Respondent rose to the level of "continuous and systematic general business contacts" with Nebraska.

Second, the Nebraska Supreme Court failed to determine whether Respondent's claim was "one which arises out of or relates to the defendant's forum-related activities," *i.e.*, the second prong of the test announced in *Lake*. In applying its two-prong test, the Nebraska Supreme Court provided little analysis to reach its conclusion that "Clevinger and Hawkins have sufficient minimum contacts with Nebraska that they should reasonably anticipate being haled into court here." App. A, 11. The Nebraska high court relied solely upon the following facts in finding that minimum contacts existed: (a) Petitioners were

employed in the State of Michigan and in other states outside the State of Nebraska by Respondent, a Nebraska corporation; (b) Petitioners once came to Nebraska for less than forty-eight hours at the demand and expense of Respondent; and (c) Respondent required Petitioners to call Respondent's Nebraska office. These forum-related contacts, all of which were mandated by Respondent, are not related to Respondent's claims. Respondent's claims sound in tort and center around Petitioner's allegedly tortious conduct occuring outside of the forum State, *i.e.*, forming a Michigan-based business to compete with Respondent solely in the State of Michigan. This Court should address this conflict and resolve the confusion for the lower courts.

CONCLUSION

The narrow facts of this case present the Court with the perfect vehicle for resolving conflicts and eliminating confusion among the lower courts with respect to the limits imposed by the Due Process Clause on the power of a State to exercise in personam jurisdiction over a nonresident individual defendant. Today it is an open issue as to whether *International Shoe*'s minimum contacts analysis still requires that a nonresident defendant must purposefully avail itself of the privilege of conducting activities within the forum State. Some courts, like the Nebraska Supreme Court, have jettisoned the general/specific jurisdiction dichotomy in favor of a simplistic two-prong test. Finally, the time has come for this Court to decide whether it will breathe new life into the oft-forgotten function of the minimum contacts requirement, *i.e.*, "to ensure that the States through their court, do not reach

out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292.

For the foregoing reasons, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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268 Neb. 388

NEBRASKA SUPREME COURT

DIVERSIFIED TELECOM SERVICES, INC., A NEBRASKA CORPORATION, APPELLANT, V. DAVID L. CLEVINGER, JR., AN INDIVIDUAL, ET AL., APPELLEES.

Filed July 16, 2004. No. S-03-808.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard L. Rice, of Crosby, Guenzel, L.L.P., for appellant.

Mark A. Fahleson, Brian S. Kruse, and Troy S. Kirk, of Rembolt, Ludtke & Berger, L.L.P., for appellees.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

I. NATURE OF CASE

The primary issue raised by this case is whether personal jurisdiction exists in Nebraska over David L. Clevinger, Jr., and Jerold J. Hawkins, both Michigan residents, and Skyline Services, L.L.C. (Skyline), a Michigan limited liability company (collectively the appellees). The district court concluded that it did not have personal jurisdiction and sustained the appellees' special appearance. We reverse the order of the district court in part, concluding that Nebraska's jurisdiction extends over Clevinger and Hawkins.

II. BACKGROUND

Diversified Telecom Services, Inc. (Diversified), filed this action against the appellees on November 1, 2002. Diversified is a Nebraska corporation engaged in the business of construction and site improvement for cellular telephone transmission towers and other communications equipment throughout the United States. Its principal office is located in Waverly, Nebraska. Clevinger and Hawkins were former employees of Diversified who provided project management services to Diversified during their employment. Clevinger was employed with Diversified from November 2001 to October 2002 and was responsible for a region that included Michigan, Indiana, Ohio, and points to the east. Hawkins was employed by Diversified from November 2001 to June 2002, and was responsible for managing sites in Michigan. In February 2002, Clevinger and Hawkins formed Skyline. Diversified alleged that Skyline was formed to also engage in the business of construction and site improvement of transmission towers and communications equipment; in essence, Skyline was to directly compete with Diversified. The petition articulated four causes of action against the appellees: breach of the duty of loyalty, tortious interference, fraud and/or misrepresentation, and conversion.

The appellees filed a special appearance challenging the district court's personal jurisdiction over them. In support of their special appearance, the appellees offered the affidavits of Clevinger and Hawkins. Both affidavits stated that neither Clevinger nor Hawkins played any role in the operations of Skyline until each was terminated by Diversified. The affidavits also stated, in short, that the appellees have never had any contacts with Nebraska, with one exception. Both men admitted that they were in

Nebraska on December 3 and 4, 2001, for the purpose of meeting the staff of Diversified.

Diversified offered the affidavit of Amy Grady, a collections specialist and administrative assistant with Diversified. Grady's affidavit stated that Clevinger and Hawkins were formerly employed by Diversified and, as such, received compensation from Diversified, including rent Clevinger received from Diversified for an office in his Michigan home. The affidavit also contained evidence of the communications that Clevinger and Hawkins had with Diversified's Waverly office. Telephone billing statements included in the record indicate that from November 19, 2001, to July 26, 2002, Clevinger and Hawkins made approximately 326 and 279 telephone calls to Nebraska, respectively. Finally, Grady's affidavit also averred that Clevinger and Hawkins came to Nebraska on December 3 and 4, 2001, to formally accept employment with Diversified, complete paperwork, obtain information regarding their new jobs, and attend meetings with Diversified's personnel.

On May 15, 2003, the district court sustained the appellees' special appearance and dismissed Diversified's petition. On May 22, Diversified filed a motion which stated in full:

> COMES NOW the Plaintiff, Diversified Telecom Services, Inc. and moves this Court pursuant to NEB. REV. STAT. § 25-1142, *et seq.* (Reissue 2000) for an order granting a new trial in this matter. Plaintiff's Motion is directed at a reexamination of this Court's findings and decision in its Order dated May 14, 2003.
>
> Plaintiff contends the Court's decision is not sustained by sufficient evidence, or is contrary to the law (Neb. Rev. Stat. § 25-1142[6]).

On June 13, 2003, the district court denied Diversified's motion. Diversified filed its notice of appeal on July 9. We later moved the case to our docket.

III. ASSIGNMENT OF ERROR

Diversified's four assignments of error can be more succinctly restated as one: The district court erred in finding that it had no personal jurisdiction over the appellees and sustaining the appellees' special appearance.

IV. STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

V. ANALYSIS

1. APPELLATE JURISDICTION

We begin by addressing the appellees' argument that this court does not have jurisdiction over Diversified's appeal. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). The appellees characterize Diversified's May 22, 2003, motion as a motion for new

trial, as it was titled, and then argue that the hearing on the appellees' special appearance was not a "trial" from which a motion for new trial could be filed. See Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002) (providing in part that "[a] new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court"). Thus, the appellees conclude that Diversified's notice of appeal was not timely filed because the May 22 motion did not terminate the 30-day appeal period after the district court sustained the appellees' special appearance.

Whether a motion for new trial is a proper motion to file after a defendant's special appearance is sustained is an issue we need not address because the appellees' initial premise – that the May 22, 2003, motion is a motion for new trial – is one we need not accept. A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion. *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra.* The running of the time for filing a notice of appeal is not only terminated by a motion for new trial, but also by a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002). *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra.* To qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of the judgment. *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra; State v. Bellamy,* 264 Neb. 784, 652 N.W.2d 86 (2002). Diversified's May 22 motion, remarkably similar to the motion at issue in *Central Neb. Pub. Power v. Jeffrey Lake Dev.,* requested a "reexamination" of the district court's May 15 decision on the basis that it was contrary to law.

Therefore, the motion sought substantive alteration of the judgment and can be characterized as a motion to alter or amend a judgment, which terminated the 30-day appeal period. See *id.* Diversified's notice of appeal was filed within 30 days of the overruling of its motion to alter or amend a judgment; thus, its notice of appeal was timely and we have jurisdiction over this matter.

2. Personal Jurisdiction

Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). Under the statutory pleading rules in effect when this action was filed, before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector. *Id.* Confronted with a special appearance, a plaintiff has the burden to establish facts which demonstrate the court's personal jurisdiction over the defendant. *Id.* In a hearing on a special appearance, an affidavit may be used to prove or disprove the factual basis for a court's assertion or exercise of personal jurisdiction over a defendant. *Id.* When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's. *Id.*

We digress for a moment to note that during oral arguments before this court, Diversified conceded that the district court correctly concluded that no personal jurisdiction exists over Skyline. Thus, our analysis below deals

only with the issue of whether Nebraska's assertion of jurisdiction extends over Clevinger and Hawkins.

Addressing that issue first requires us to determine what evidence we may consider. As noted, Diversified had the burden to establish facts demonstrating the court's personal jurisdiction over the appellees. To satisfy that burden, Diversified offered into evidence the affidavit of Grady. The appellees objected to the offer. The district court stated that it would reserve ruling on the objection, and the hearing on the appellees' special appearance promptly concluded. Thus, the court never expressly received the affidavit into evidence, although the court did refer to it in its order sustaining the appellees' special appearance.

The appellees argue that Grady's affidavit may not be considered on appeal because "'[u]nless the [exhibit] is marked, offered, ***and*** accepted, it does not become part of the record and cannot be considered . . . as evidence in the case.'" Brief for appellees at 29, quoting *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003). Diversified counters the appellees' argument with a quotation from *R.W. v. Schrein,* 264 Neb. 818, 821, 652 N.W.2d 574, 578 (2002) (supplemental opinion), where we stated:

> "'"If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, *or to insist upon a ruling on an objection to the introduction of the evidence,* and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, *and the evidence is in the record for consideration the same as other evidence.*"'"

(Emphasis in original.)

Diversified argues that the appellees waived any objection to Grady's affidavit when they failed to insist upon a ruling on their objection. See *id.* (it is well established that a party who fails to insist upon a ruling to a proffered objection waives that objection). Although we did not consider the exhibit at issue in *R.W. v. Schrein, supra,* because we could not determine whether it had been received into evidence, we cautioned parties that when they fail to insist upon rulings to their objections, they do so at their own peril. Having been forewarned, the appellees in this case did not insist upon a ruling to their objections. Those objections are therefore waived, and Grady's affidavit is available to us as we consider whether personal jurisdiction exists over Clevinger and Hawkins.

Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. See § 25-536(2); *Quality Pork Internat. v. Rupari Food Servs.,* 267 Neb. 474, 675 N.W.2d 642 (2004). Thus, we need only consider whether Nebraska's exercise of jurisdiction over the appellees would be consistent with due process.

The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations. *Kugler Co. v. Growth Products Ltd.,* 265 Neb. 505, 658 N.W.2d 40 (2003). To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend "'traditional notions of fair play and substantial justice.'"

Internat. Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *Kugler Co. v. Growth Products Ltd., supra.* Thus, the determination whether the court has jurisdiction is a two-step process. First, we must determine whether the appellees had the necessary minimum contacts with Nebraska, and second, if such minimum contacts have been established, the contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice. See *Kugler Co. v. Growth Products Ltd., supra.*

(a) Minimum Contacts

The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Quality Pork Internat. v. Rupari Food Servs., supra.* This analysis requires that we consider the quality and nature of the defendant's activities in order to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process. *Kugler Co. v. Growth Products Ltd., supra.*

Under such an analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *Id.* Rather, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* This requirement ensures that a defendant will not be subject to litigation in a jurisdiction

solely due to random, fortuitous, or attenuated contacts. *Id.*

The scope of Clevinger's and Hawkins' contacts with Nebraska is predicated on several facts established by Grady's affidavit. Each was employed by Diversified, a Nebraska corporation – Clevinger for approximately 11 months and Hawkins for approximately 7 months. By virtue of the employment relationship, Clevinger and Hawkins provided management services to Diversified and were compensated for those services. More importantly, Clevinger and Hawkins came to Nebraska on December 3 and 4, 2001, to meet Diversified's staff and also made hundreds of telephone calls to Nebraska from November 2001 to July 2002.

Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with the forum state are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself or herself has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). Clevinger and Hawkins argue that their December 2001 visit to Nebraska and their hundreds of telephone calls with Nebraska were requirements of their employment and that, therefore, they were merely responding to Diversified's unilateral acts. We do not agree. The employment relationship between Diversified and Clevinger and Hawkins by definition includes various *mutual,* rather than unilateral, promises and obligations. While such an employment relationship might not, by itself, provide the

necessary contacts for personal jurisdiction in this state, our record also contains evidence of Clevinger's physical presence in Nebraska and the hundreds of telephone calls they made here. The U.S. Supreme Court has stated that "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). In addition, this court has stated that mail and telephone communications sent by a defendant into a forum may count toward the minimum contacts that support jurisdiction. *Crete Carrier Corp. v. Red Food Stores,* 254 Neb. 323, 576 N.W.2d 760 (1998). Considering all of the facts before us, we conclude that Clevinger and Hawkins have sufficient minimum contacts with Nebraska that they should reasonably anticipate being haled into court here.

(b) Fair Play and Substantial Justice

Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "'fair play and substantial justice.'" *Burger King Corp. v. Rudzewicz,* 471 U.S. at 476; *Quality Pork Internat. v. Rupari Food Servs., supra.* These considerations include (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Burger King*

APPENDIX B

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

DIVERSIFIED TELECOM SERVICES, INC., a Nebraska Corp., Plaintiff,	)	**Case No. CI02-4134**
	)	**ORDER**
vs.	)	
DAVID L CLEVENGER, JR., an individual, JEROLD J. HAWKINS, an individual, and SKYLINE SVCS., a Michigan Limited Liability Co., Defendants.	)	

THIS MATTER CAME on for hearing on February 28, 2003 on the Special Appearance filed by Defendants David L Clevenger, Jr., Jerold J. Hawkins, and Skyline Svcs.' (Defendants) Hearing was held and evidence was adduced. The Defendants were represented by Attorney Fahleson and Plaintiff Diversified Telecom Services, Inc. was represented by Attorney Rice. The court, being fully informed, finds and orders as follows:

STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, the determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on an issue will be upheld unless the

factual findings concerning jurisdiction are clearly incorrect. *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998).

Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997); *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995). Before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector. *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996); *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). The burden of proof rests upon the plaintiff confronted with a special appearance to demonstrate the court's personal jurisdiction over the defendant. *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998); *Crystal Clear Optical v. Silver*, 247 Neb. 981, 531 N.W.2d 535 (1995); *Wagner v. Unicord Corp.*, 247 Neb. 217, 526 N.W.2d 74 (1995).

Because Nebraska's long-arm statute, Neb.Rev.Stat. § 25-536 (Reissue 1995), expressly extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation with Nebraska as far as the U.S. Constitution permits, the court needs to address only whether the out of state defendant had such minimum contacts with Nebraska that the exercise of personal jurisdiction would not offend federal constitutional principles. *See, Crystal Clear Optical, supra; Wagner, supra.* Thus, the court must determine whether a Nebraska court's assertion or exercise of jurisdiction over the out of state defendant would be consistent with due process.

The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Wagner, supra; 24th and Dodge Ltd. v. Commercial Nat. Bank*, 243 Neb. 98, 497 N.W.2d 386 (1993).

> Due process for personal jurisdiction over a nonresident defendant requires the defendant's minimum contacts with the State of Nebraska so that maintenance of the suit does not offend traditional notions of fair play and substantial justice. To determine whether a court has personal jurisdiction over a nonresident defendant, the court must examine the quality and nature of the nonresident's activities and ascertain that the nonresident has sufficient minimum contacts with the forum state to satisfy the requisite due process for assertion or exercise of personal jurisdiction.

Internat. Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

Fairness and reasonableness, essential to due process in personal jurisdiction over a nonresident defendant, require that the defendant's contact with the forum state must be of a quality and nature that the defendant "should reasonably anticipate being haled into court" in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d. 490 (1980). The minimum contacts standard, expressed in *Internat. Shoe Co. v. Washington, supra*, supplies "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will and will not render

them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, *supra* at 297, 100 S.Ct. at 567.

A defendant's purposeful act, directed to the forum state, not merely the unilateral activity of another who claims a relationship to the defendant, connects the defendant to the forum state. *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). *Williams. v. Gould, Inc.*, 232 Neb. 862, 876-77, 443 N.W.2d 577, 587 (1989). Whether a Nebraska court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with Nebraska are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself acted in a manner which creates substantial connections with Nebraska, resulting in the defendant's purposeful availment of the benefits and protections of Nebraska law. *Wagner*, 247 Neb. at 223, 526 N.W.2d at 78, quoting *Williams, supra*. The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *24th and Dodge Ltd.*, 243 Neb. at 102, 497 N.W.2d at 390, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

An individual's contract with a party within a forum state does not, in and of itself, provide the necessary contacts for personal jurisdiction in the forum state. *Burger King Corp., supra*; *Williams, supra*. To determine

whether a defendant's contract supplies the contacts necessary for personal jurisdiction in the forum state, the court is to consider the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing. *Id.* It is sufficient for purposes of due process that suit is based on a contract which had substantial connection with that state. *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987).

Under the concept of general jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state, provided that the defendant has engaged in continuous and systematic general business contacts with the forum state. *Dunham*, 2 Neb.App. at 973, 520 N.W.2d at 220. If the defendant's contacts with a forum state are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert 'specific jurisdiction' over the defendant, depending on the quality and nature of such contact. *Id.*

ANALYSIS

1. General Jurisdiction

The court must first decide whether the Defendants' activities qualify as "continuous and systematic" or "substantial" to satisfy general personal jurisdiction. In doing so, the court must examine all of the Defendants' activities which impact the forum state, including whether the defendants make sales, solicit or engage in business, serve the state's markets, designate an agent for service of

process, hold a license, have employees, or are incorporated here. *See Dunham*, 2 Neb.App. at 974, 520 N.W.2d at 220.

In the instant case, there is no evidence that the Defendants make sales, solicit or engage in business, serve the state's markets, designated an agent for service of process, hold a license, have employees, or are incorporated in Nebraska. Therefore, there is insufficient evidence showing that the Defendants had continuous and systematic business contact with Nebraska sufficient to warrant general jurisdiction over their actions in this matter.

2. Specific Jurisdiction

The exercise of specific jurisdiction under § 25-536(2), permitting jurisdiction on any basis or contact which does not run afoul of the protections of the Due Process Clause of the 14th Amendment, entails three basic requirements. In *Dunham, supra*, the Nebraska Supreme Court, citing *Lake v. Lake*, 817 F.2d 1416 (9th Cir.1987), set forth these requirements and held that:

> (1) the Nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Id. Therefore, the analysis of Defendants' special appearance will focus on those three prongs.

a. Purposeful Availment

"Purposeful availment" means that the defendant's connection with the forum state must be deliberate and substantial, involving significant activities or continuing obligations. *Dunham, supra*, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462. The connection cannot be random, fortuitous, attenuated, or the result of another party's unilateral activities. *Id. See, also, Gray v. Lewis & Clark Expeditions, Inc.*, 12 F.Supp.2d 993 (D.Neb.1998).

According to the *Burger King Corp.* analysis, whether a Nebraska court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with Nebraska are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself acted in a manner which creates substantial connections with Nebraska, resulting in the defendant's "purposeful availment" of the benefits and protections of Nebraska law. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *24th and Dodge Ltd.*, 243 Neb. at 102, 497 N.W.2d at 390, quoting *Burger King*.

In the instant case, the question is whether the single visit and phone and fax communications from the defendants establish that they purposefully directed their activities at Nebraska residents. The court concludes that

the evidence adduced is insufficient to prove that the Defendants purposefully directed their activities at Nebraska. Without evidence of additional sales or facts showing Defendant was the aggressor in the transaction, the interaction and activities as shown do not show purposeful availment of the Nebraska market.

Purposeful availment requires that the Defendants' connection with Nebraska be deliberate and substantial involving significant activities or continuing obligations. *Robinson*, 10 Neb.App. At 976, 641 N.W.2d at 409. However, in the instant case, the Defendants did nothing which would have led them to reasonably anticipate being haled into a Nebraska court. *Id.* Additionally, the present case is distinguishable from the finding of purposeful availment in *Dunham*, where evidence showed that the defendant specifically targeted Nebraska. *Dunham*, 2 Neb.App. at 970, 520 N.W.2d at 219. Finally, there was no act by which the Defendants purposefully availed themselves of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *24th and Dodge Ltd., supra*; quoting *Burger King, supra*. Therefore, prong one of the three part Nebraska test is not satisfied because there is insufficient evidence to prove purposeful availment on the part of the defendants as required by *Dunham* and *Burger King*.

b. Defendant's Forum-Related Activities

Plaintiff asserts that the Defendants made several hundred phone calls and several fax transmissions to the Plaintiff's office in Waverly, Nebraska over the course of their employment with the Plaintiff. Plaintiff also asserts that the Defendants traveled to Nebraska to sign their

contracts with the Plaintiff, meet *[sic]* with several members of Plaintiff's business, and receive a tour of the facilities. However, the Defendants were "required to . . . communicate with the Plaintiff's principle office. . . ." (Grady Affidavit ¶6). The Defendants' contacts were required as an employee of Plaintiff and, therefore, are not the result of the defendants' purposeful availment to the forum or actions "within" the forum. The connection to a forum cannot be random, fortuitous, attenuated or the result of another party's unilateral activities. *Robinson, supra*. By requiring Defendants to call Nebraska daily, Plaintiff was placing a unilateral requirement on the Defendants. It was not the Defendants' actions in the forum, rather it was the requirements of the Plaintiff that caused the calls to be made. The only contacts by the Defendants which were not unilateral would be the occasional fax or e-mail and the one time visit to Waverly, Nebraska to sign the contracts. The court notes that a "forum choice clause" is absent from the contract. It is the conclusion of the court that these limited contacts by the defendants are not substantial enough to satisfy this prong of the *Dunham* test.

c. Fair Play and Substantial Justice

Implicit in the emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will, in an appropriate case, be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, *see McGee v. International Life Ins.* Co., 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, *see Kulko v. California Superior Court*, 436 U.S. 84 (1978), at least when that interest is not adequately

protected by the plaintiff's power to choose the forum, *cf. Shaffer v. Heitner*, 433 U.S. 186, 211, n. 37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies. *See Kulko, supra.*

The U.S. Supreme Court has held that the reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on minimum contact, the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of minimum contacts. *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir.1994); *accord Burger King*, 471 U.S. at 477, 105 S.Ct. 2174. Therefore, consistent with the court's conclusion that the defendants have minimum contacts with Nebraska, this prong of analysis requires a minimal showing by the Defendants to show that jurisdiction is unreasonable.

The events surrounding and leading to the Plaintiff's allegations occurred in Michigan. The majority of potential witnesses are located in Michigan. The Defendants maintains *[sic]* no presence in Nebraska, instead conducting all of their operations in Michigan. Conversely, Plaintiff has contacts in Michigan, has maintained an office in Michigan in the past, and is suing on the basis of actions which took place in Michigan. In light of all of these factors, it is the conclusion of the court that defending this action in Nebraska would place an unreasonable burden on the Defendants.

Therefore, it is the conclusion of the court that the Special Appearance filed by the Defendants should be sustained and granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Special Appearance filed by the Defendants is sustained and granted for the reason that this Court has no jurisdiction over the Defendants in this matter. It is further ordered that the petition is dismissed at plaintiff's costs.

Dated this 14th day of May, 2003.

BY THE COURT:

/s/ John A. Colborn
John A. Colborn
District Court Judge

cc: Mark A. Fahleson, **Attorney for the Defendant**
Richard L. Rice, **Attorney for the Plaintiff**